

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 147 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

HARIJAN BIJAL DANA

Versus

GADA KARSAN RAVAJI

Appearance:

NR MA SAPA for MR PV HATHI for Appellant
MR YS MANKAD for Respondent No. 1, 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 29/09/2000

ORAL JUDGEMENT

1. This Appeal is filed against the judgment and order of the learned Assistant Judge, Kachchh at Bhuj, in Regular Civil Appeal No. 426 of 1980, passed on 26th September, 1983, thereby dismissing the Regular Civil

Appeal No. 426 of 1980, which was filed against the judgment and decree passed by the trial court in Regular Civil Suit No.49 of 1979, by Civil Judge (JD), Bhachau.

2. Original appellant is the original defendant while present respondents are the original plaintiffs in Regular Civil Suit No. 49 of 1979, as referred to above, filed by the plaintiffs in the Court of Civil Judge (JD), Bhachau. The respondents filed the suit alleging that they owned a property at village Lakadia, in Bhachau Taluka, which consists of three rooms. One room was already there since old time i.e. before 1955, and two rooms were constructed thereafter. The old room had a window since old time admeasuring 4 feet x 2 feet in its eastern wall for more than 40 years before the filing of the suit. As per the case of the plaintiffs, they acquired an easement right to take air and light through this window in this old room. The right of easement acquired, according to the plaintiffs, was prescriptive in the nature. Somewhere in March 1977, the present appellant - original defendant started a construction of a wall just adjacent to the eastern wall of the said suit room so as to obstruct the easement right of the plaintiffs, and hence, the Civil Suit came to be filed by the plaintiffs, bearing No. 18 of 1977, in the Court of Civil Judge (JD) Bhachau. A panchnama was drawn in the said suit, and it was obvious through panchnama that half of the suit window was totally closed by the construction of wall by the present appellant. The said suit, bearing No.18 of 1977, came to be dismissed by Civil Judge (JD), Bhachau, and an Appeal was filed by the plaintiffs against the said judgment. In Appeal, plaintiffs, present respondents, withdrew the suit with permission to

file a fresh suit. Learned District Court allowed the plaintiffs - present respondents, to withdraw the Civil Suit No. 18 of 1977 with permission to file a fresh suit and, therefore, the present respondents filed the present Civil Suit No. 49 of 1979 for mandatory injunction against the defendant to remove the wall constructed by them and for permanent injunction restraining the defendant from causing any obstruction in their enjoyment of the easement right in the future.

3. The Regular Civil Suit No. 49 of 1979 resisted by the present appellant - defendant, inter alia, stating that they are the owners of the eastern side of the room

and they were at liberty to use the said land as per their wish. It was also the case of the defendant appellant that the window is newly opened and was not old as per the say of the plaintiffs. There cannot be according to the defendant any right for taking air and light in favour of the plaintiff through his (defendant's) land. It was also stated that there was a narrow street between the eastern wall of the suit room and the wall constructed by him. It was also contended that the suit was barred by the principle of res judicata because the earlier suit of the plaintiff was dismissed. It was also contended that the wall was already there from the very beginning and it was not newly constructed and, therefore, it was urged that the suit was required to be dismissed.

4. The trial court recorded the evidence and after hearing the parties, came to the conclusion that plaintiff could establish his easementary rights and obstruction thereof. So, the trial court decreed the suit in favour of the plaintiff. While the appellate court heard both the parties and dismissed the appeal of the original defendant. Thus, both the courts below came to the conclusion that Exh. 21 partition deed which is dated 23rd March, 1961 clearly denotes an old room i.e. the suit room, and that also denotes that the room was in existence prior to year 1955. Both the courts below after appreciating the evidence of the plaintiff No.2, the evidence of witness Bhana Kaya, who was aged 72 at that time, and appreciating the evidence of witness Jusab Ibrahim, a Havaladar, in Ex-Princely State of Kachchh, came to the conclusion that there was existence of suit window for more than 40 years and, therefore, the plaintiffs were able to prove their right of easement of light and air through prescription. As against that, both the courts below appreciated the evidence of defendant side and came to the conclusion that if the window was new and was being placed on the wall of the suit room, the defendant had not taken objection to that, which fact shows the existence of window since long time. The defendant, according to both the courts below, has given lame excuses for not raising any objection when according to defendant, suit window was constructed newly. Both the courts below came to the conclusion that the wall constructed was new one and was being

constructed in the manner so as to close down the suit window. Both the courts below have taken corroboration from the pleadings of the defendant in earlier suit No. 18 of 1977 and both the courts below on point of fact came to the conclusion that the easement right of light and air was enjoyed by the plaintiffs without interruption for a period of more than 20 years and that fact was proved from an admission of the defendant in his written statement in previous suit, in which the defendant stated that the window was open at the time of construction of room itself, but he could not raise objections and he could not file suit due to his poor condition, so on facts, both the courts below came to the conclusion that there was easement right in favour of the plaintiff, which was being obstructed by constructing a wall by the defendant. So far as this conclusion is concerned, it requires no interference because these are the findings of fact.

5. Learned Advocate Mr. M.A. Sapa for learned Advocate Mr. P.V. Hathi for the appellant and learned Advocate Mr. Y.S. Mankad for the respondent were heard at length.

6. Though, while admitting the Appeal, as many as 8 substantial questions of law have been framed by this Court, but mainly two substantial questions of law arises

for consideration in this Appeal, first, whether both the courts below were err in granting an injunction in the mandatory nature, and second, whether the present suit was barred by principle of res judicata .

7. So far as the first substantial question of law is concerned while the easementary right like light and air is obstructed, and it is proved that the plaintiffs had such a prescriptive easement in his favour, there is no alternative for the plaintiffs but to ask for the removal of the obstruction in the enjoyment of easementary right, if such obstruction is new one. The fact goes to show that the plaintiffs were able to prove that the suit window by which they and their predecessors had been enjoying the right of light and air was in existence for more than 40 years prior to the filing of the suit. On facts, it was also decided by the both the courts below that the wall which was being constructed to close the suit window was newly one, as admitted by the defendant. In these circumstances, granting of relief of

mandatory injunction to the plaintiffs would be the only remedy to protect the legal right of the plaintiffs. Therefore, none of the courts below erred in law in granting the relief of mandatory injunction to remove the wall, which was obstruction to the enjoyment of easement by the plaintiffs. So far as the second substantial question of law is concerned, it is true that earlier Civil Suit being Regular Civil Suit No. 18 of 1977 was filed by the plaintiffs, which was dismissed by the trial court and in the first appeal, the plaintiffs felt that

the suit was likely to be defeated on technical grounds and they urged the first appellate court to permit them to withdraw the suit with permission to file a fresh suit. The court was empowered to grant such permission and the permission to withdraw the suit with permission to file a fresh suit, was granted by the first appellate court. In these circumstances, the plaintiffs the present respondents were legally entitled to bring a fresh suit against the defendant. The question of res judicata, therefore, does not arise. Both the courts below in this respect also did not err in law.

8. In this view of the matter, this Appeal is without any substance and requires to be dismissed. In the result, Appeal stands dismissed with no order as to costs.

(J.R. Vora, J.)

p.n.nair